

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BETTY MOON

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

NO. CV-06-0328-EFS

**ORDER ENTERING THE  
COURT'S RULINGS FROM  
JULY 24, 2008 HEARING**

A hearing occurred in the above-captioned matter on July 24, 2008, in Spokane. Amos Hunter and Geoffrey Swindler appeared on behalf of Plaintiff Betty Moon; Andrew Biviano appeared on behalf of Defendant United States of America. Before the Court was Defendant's Motion for Summary Judgment. (Ct. Rec. 18.) After reviewing the submitted material, relevant authority, and hearing oral argument, the Court was fully informed and granted Defendant's motion. This Order serves to memorialize and supplement the Court's oral ruling.

**I. BACKGROUND**

On June 27, 2003, Plaintiff entered Glacier National Park ("Glacier") accompanied by her mother, daughter-in-law, and grandson. That afternoon, the family went to the beach in front of Lake McDonald Lodge. Plaintiff sat directly under a Black Cottonwood tree conversing

1 with other park patrons and watching her grandson play near the lake.  
2 (Ct. Recs. 44 at 3; 34 at 2.) At approximately 4:00 p.m., a large  
3 branch broke off the Black Cottonwood tree and struck Plaintiff; she  
4 sustained fractures to her skull and vertebrae in her cervical, thoracic,  
5 and lumbar regions. *Id.*

6 Glacier covers approximately 1,600 square miles in northwestern  
7 Montana. The park is managed by the National Parks Service ("NPS"), an  
8 agency within the Department of the Interior. (Ct. Rec. 44 at 2.) NPS'  
9 mission, as statutorily defined in the Organic Act, is to

10 "promote and regulate the use of the . . . national parks . .  
11 . to conserve the scenery and the natural and historic objects  
12 and the wildlife therein and to provide for the enjoyment of  
the same in such manner and by such means as will leave them  
unimpaired for the enjoyment of future generations."

13 16 U.S.C. § 1. Glacier's operations are governed by three (3)  
14 policies: the first is NPS' *Management Policies 2001*, which delineates  
15 the visitor safety policy for all National Parks; the second is the  
16 Natural Resources Management Guidelines ("NPS-77"), which contains a  
17 "Hazardous Tree" section that "provides the foundation for each park to  
18 implement its own hazardous tree management plan"; and the third is  
19 Glacier's Hazard Tree Management Plan ("HTMP"), which tailors the NPS-77  
20 hazard tree management recommendations to Glacier's individualized needs.  
21 (Ct. Recs. 25-3 at 28; 40-1 at 2, 9.)

22 Under the HTMP, Glacier is divided into four (4) area types:  
23 natural, developed, historic, and special use. (Ct. Rec. 44 at 4.) The  
24 Lake McDonald Lodge area - where the accident occurred - is classified  
25 as a developed area. *Id.* Developed areas are the park areas most  
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1 frequently occupied by visitors and employees and, consequently, are  
2 given highest priority for visitor safety. The practical effect is that  
3 developed areas are surveyed for hazardous trees more frequently than  
4 lower priority zones. *Id.* There are six (6) developed zones in Glacier,  
5 which comprise approximately 20,000 acres of parkland containing many  
6 thousands of trees. *Id.*

7 The HTMP mandates that the NPS conduct annual surveys of developed  
8 areas to identify hazardous trees. (Ct. Rec. 44 at 4.) The two (2)  
9 survey types utilized to identify potentially hazardous trees are the  
10 surveillance survey and the examination survey.

11 The surveillance survey is a generalized method of detecting  
12 potentially hazardous trees and is administered by walking or driving  
13 through an area and visually scanning the forest for trees that exhibit  
14 signs of tree failure. (Ct. Rec. 40-1 at 6.) Potentially hazardous  
15 trees are reported to the hazard tree team leader for further inspection  
16 through the examination survey. *Id.*

17 The examination survey is a more comprehensive individualized  
18 inspection, where each potentially hazardous tree identified in the  
19 surveillance survey is carefully surveyed for defects using the Hazard  
20 Rating System (HRS). (Ct. Rec. 40-1 at 6, 10.) Through a comprehensive  
21 set of techniques, the HRS balances the probability of tree failure, the  
22 probability of damage to a target (people/property), the target's value,  
23 and the aesthetic, historic, and ecological value of the tree. (Ct. Rec.  
24 40-1 at 10.) Trees not designated as hazardous, i.e., those without  
25 defects or with defects but not likely to fall, are monitored annually  
26 in developed areas to detect any changes in their condition. *Id.* Trees

1 designated as hazardous may be entirely removed, topped, or have  
2 defective limbs removed. Alternatively, the site may be closed. *Id.*

3 On May 8, 2003, the hazard tree work team prepared a report after  
4 performing a surveillance survey on the trees surrounding Lake McDonald  
5 Lodge. (Ct. Rec. 44 at 4.) The team did not designate the subject Black  
6 Cottonwood tree as hazardous.

## 7 **II. DISCUSSION**

### 8 **A. Standard**

9 Before addressing the merits of Defendant's motion, it is necessary  
10 to determine what standard applies. There are two types of motions to  
11 dismiss challenging subject matter jurisdiction: facial and factual  
12 challenges. A facial attack is based on the allegations in the  
13 complaint, together with documents attached to the complaint, judicially-  
14 noticed facts, and undisputed facts in the record. *Thornhill Publ'g Co.*  
15 *v. Gen. Tel & Elecs.*, 594 F.2d 730, 733 (9th Cir. 1979). A factual  
16 attack to subject matter jurisdiction is based on extrinsic evidence  
17 apart from the pleadings. *Gould Elecs., Inc. v. United States*, 220 F.3d  
18 169, 176 (3d Cir. 2000). Where the jurisdictional issues and substantive  
19 issues are so intertwined that the question of jurisdiction is dependent  
20 upon the resolution of factual issues going to the merits, courts should  
21 consider the motion under the standards for summary judgment. *Thornhill*  
22 *Publ'g Co.*, 594 F.2d at 733-34.

23 Here, Plaintiff Betty Moon filed a claim under the Federal Tort  
24 Claims Act (FTCA) alleging that Defendant negligently failed to (1)  
25 identify and correct a dangerous condition posed by an aging Black  
26 Cottonwood tree branch, and (2) warn her of the subject tree's dangerous

1 condition. (Ct. Rec. 2 at 4.) Because Plaintiff's FTCA claims are  
2 intertwined with the jurisdictional question, the Court reviews  
3 Defendant's motion under the summary judgment standard.

4 Summary judgment is appropriate if the "pleadings, depositions,  
5 answers to interrogatories, and admissions on file, together with the  
6 affidavits, if any, show that there is no genuine issue as to any  
7 material fact and that the moving party is entitled to judgment as a  
8 matter of law." FED. R. CIV. P. 56(c). Once a party has moved for  
9 summary judgment, the opposing party must point to specific facts  
10 establishing that there is a genuine issue for trial. *Celotex Corp. v.*  
11 *Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving party fails to make  
12 such a showing for any of the elements essential to its case for which  
13 it bears the burden of proof, the trial court should grant the summary  
14 judgment motion. *Id.* at 322. "When the moving party has carried its  
15 burden of [showing that it is entitled to judgment as a matter of law],  
16 its opponent must do more than show that there is some metaphysical doubt  
17 as to material facts. In the language of [Rule 56], the nonmoving party  
18 must come forward with 'specific facts showing that there is a *genuine*  
19 *issue for trial.*'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,  
20 475 U.S. 574, 586-87 (1986) (citations omitted) (emphasis in original  
21 opinion).

22 When considering a motion for summary judgment, a court should not  
23 weigh the evidence or assess credibility; instead, "the evidence of the  
24 non-movant is to be believed, and all justifiable inferences are to be  
25 drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255  
26 (1986). This does not mean that a court will accept as true assertions

1 made by the non-moving party that are flatly contradicted by the record.  
2 *See Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007) ("When opposing parties  
3 tell two different stories, one of which is blatantly contradicted by the  
4 record, so that no reasonable jury could believe it, a court should not  
5 adopt that version of the facts for purposes of ruling on a motion for  
6 summary judgment.").

7 **B. Jurisdiction**

8 Federal courts are courts of limited jurisdiction; as such, they are  
9 empowered to hear only those cases that are within the judicial power of  
10 the United States as defined by the United States Constitution and those  
11 cases authorized by Congress. *Mendoza v. Zirkle Fruit Co.*, 301 F.3d  
12 1163, 1174 (9th Cir. 2002); *Estate of Branson v. Comm'r of Internal Rev.*,  
13 264 F.3d 904, 908 (9th Cir. 2001). Based on these limits, the party  
14 initiating the suit in federal court must affirmatively allege facts in  
15 the complaint demonstrating that the federal court has jurisdiction to  
16 hear the case. *Fifty Assocs. v. Prudential Ins. Co.*, 446 F.2d 1187, 1189  
17 (9th Cir. 1970).

18 Federal courts generally lack the authority to consider and grant  
19 relief against the United States unless Congress explicitly waives  
20 sovereign immunity. Such a waiver exists under the FTCA where a  
21 plaintiff brings a claim based on a United States employee's negligence.  
22 *See* 28 U.S.C. §§ 1346, 2671, & 2674.<sup>1</sup> Congress did not, however, waive  
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24 <sup>1</sup> 28 U.S.C. § 2674 sets forth, "[t]he United States shall be  
25 liable, respecting the provisions of this title relating to tort claims,  
26 in the same manner and to the same extent as a private individual under

1 immunity when the action complained of is the result of a discretionary  
2 function on the part of a federal agency or an employee of the  
3 government. *Id.* This is known as the discretionary function exception.

4 **C. Discretionary Function Exception**

5 The discretionary function exception bars "[a]ny claim . . . based  
6 upon the exercise or performance or the failure to exercise or perform  
7 a discretionary function or duty on the part of a federal agency or an  
8 employee of the Government, whether or not the discretion involved be  
9 abused." *Id.* The exception's purpose is to "prevent judicial 'second-  
10 guessing' of legislative and administrative decisions grounded in social,  
11 economic, and political policy through the medium of an act of tort."  
12 *United States v. Gaubert*, 499 U.S. 315, 323 (1991) (citing *United States*  
13 *v. Varig Airlines*, 467 U.S. 494, 813 (1984)). Accordingly, if the  
14 discretionary function exception applies to the challenged governmental  
15 conduct, the United States retains sovereign immunity, and a district  
16 court lacks subject matter jurisdiction to hear the suit. This is true  
17 even where governmental discretion may have been negligently exercised.  
18 28 U.S.C. § 2680(a); *In Re Glacier Bay*, 71 F.3d 1447, 1451 (9th Cir.  
19 1995). The burden of demonstrating the discretionary function  
20 exception's applicability lies with the United States. *Reed v. U. S.*  
21 *Dep't of the Interior*, 231 F.3d 501, 503 (9th Cir. 2000).

22 The Supreme Court created a two-part test to determine whether the  
23 discretionary function exception applies. *Berkovitz v. United States*,  
24 486 U.S. 531 (1988). First, a court must determine whether a federal  
25 employee's action involves "an element of judgment or choice," i.e., it

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like circumstances . . . ."

1 is discretionary. *Id.* at 536. If it does, then the court must decide  
2 whether that judgment "is the kind that the discretionary function  
3 exception was designed to shield," which "protects only government  
4 actions and decisions based on considerations of public policy." *Id.* at  
5 536-37.

6 **1. Part One - Discretionary Action**

7 Defendant argues that the Court lacks subject matter jurisdiction  
8 because Glacier's policies provide park officials considerable discretion  
9 in how to manage dangerous trees. (Ct. Rec. 20 at 10-12.) Plaintiff  
10 responds that Glacier's governing policies contain mandatory language  
11 directing the NPS to thoroughly inspect all trees in developed areas.

12 Even viewing the evidence in Plaintiff's favor, Glacier's governing  
13 policies are discretionary in this instance. Plaintiff's sweeping  
14 assertion that each of Glacier's governing policies are mandatory is  
15 belied by the specific language in each policy. For example, Management  
16 Policies 2001 states that "[t]hese management policies do not impose  
17 park-specific visitor safety prescriptions. The means by which public  
18 safety concerns are to be addressed is left to the discretion of  
19 superintendents and other decision-makers at the park level." (Ct. Rec.  
20 25-3 at 30.) The NPS-77 states, "[t]he following guidance may be used  
21 in developing a park plan. Each plan must be tailored to a park's  
22 particular requirements . . . ." (Ct. Rec. 25-3 at 33.)

23 The Management Policies 2001 and NPS-77's plain language affords  
24 broad discretion for Glacier officials to implement a hazardous tree  
25 management plan according to the park's individualized needs. Nothing  
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1 binds Glacier officials to implement the generalized schematic for  
2 hazardous tree management outlined in the policies.

3 Glacier's third governing policy, the HTMP, does contain a mandatory  
4 provision requiring annual surveys of developed zones: "Surveys are  
5 conducted annually in the spring, before facilities open." (Ct. Rec. 25-  
6 4 at 46.) Plaintiff interprets this provision to require an  
7 individualized examination survey of all trees in developed areas.  
8 Incorrect. Whether or not to conduct a more intensive examination survey  
9 is dependent upon park employees' discretionary determinations in the  
10 surveillance survey. (Ct. Rec. 25-4 at 48.)

11 Here, Glacier employees performed the mandatory annual surveillance  
12 survey on May 8, 2003, and did not identify the subject Black Cottonwood  
13 tree as potentially hazardous. Because Glacier satisfied the HTMP's only  
14 mandatory provision - the surveillance survey -, Glacier employees were  
15 not required to perform additional surveying, testing, core sampling, or  
16 mitigation in relation to the subject Black Cottonwood tree. Part one  
17 of the discretionary function analysis is satisfied because Glacier  
18 fulfilled its sole obligation under the HTMP; the remaining policies were  
19 discretionary. See *Gaubert*, 499 U.S. at 324.

## 20 **2. Part Two - Policy Inquiry**

21 Defendant argues that part two is satisfied because Glacier's  
22 hazardous tree management decisions require it to balance multiple policy  
23 considerations, including cost, public safety, public access, and  
24 ecological conservation, all of which are grounded in the Organic Act.  
25 (Ct. Rec. 20 at 12.) Plaintiff responds that hazardous tree management  
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1 is part of Glacier's routine maintenance responsibilities and does not  
2 involve policy-weighting decisions. (Ct. Rec. 34 at 15.)

3 As stated, Defendant must demonstrate that Glacier's hazardous tree  
4 management decisions are "based on considerations of public policy" of  
5 the kind that "the discretionary function exception was designed to  
6 shield" to satisfy part two of the discretionary function test.  
7 *Berkovitz*, 486 U.S. at 536-537. Generally, courts have held that part  
8 two of the *Berkovitz* test is satisfied when NPS decisions involve a  
9 combination of policy considerations such as safety, aesthetics,  
10 environmental impact, and available financial resources. See, e.g.,  
11 *Terbush v. United States*, 516 F.3d 1125, 1133-34 (9th Cir. 2008) (finding  
12 part two is satisfied where non-routine maintenance decisions implicate  
13 a balancing of policy considerations, including safety); *Merando v.*  
14 *United States*, 517 F.3d 160, 172, (3rd Cir. 2008) (finding part two is  
15 satisfied when the NPS "windshield inspection" program balanced visitor  
16 safety, visitor enjoyment, and park conservation); *Kiehn v. United*  
17 *States*, 984 F.2d 1100, 1105 (10th Cir. 1993) (finding part two is  
18 satisfied when the NPS decision not to post warning signs balanced  
19 resource allocation, visitor safety, and scenic preservation); *Autery*  
20 *v. United States*, 992 F.2d 1523, 1530 (11th Cir. 1993) (finding part two  
21 is satisfied where the government weighed the risk of harm from trees in  
22 various locations, the need for other safety programs, the preservation  
23 of forest's natural state, and limited financial and human resources).

24 Even viewing the evidence in Plaintiff's favor, part two is  
25 satisfied because Glacier employees balanced numerous policy  
26 considerations when identifying and mitigating the dangers posed by

1 hazardous trees, including (1) public safety, (2) cost, (3) public  
2 access, and (4) ecological conservation. (Ct. Rec. 40-1 at 2, 5, 10.)  
3 Plaintiff's reliance on *Terbush*, 516 F.3d at 1133-34, for the proposition  
4 that Glacier's hazardous tree management plan is nothing more than  
5 routine maintenance devoid of policy weighing decisions is misplaced  
6 because the Ninth Circuit specifically noted that maintenance decisions  
7 implicating multiple policy considerations, including safety, likely  
8 satisfy part two of the *Berkovitz* test.

9 Glacier's hazardous tree management plan involves balancing multiple  
10 policy considerations that extend far beyond routine maintenance,  
11 including visitor safety concerns, conservation, visitor enjoyment, park  
12 access, and cost. (Ct. Rec. 40-1 at 2, 5, 10.) Therefore, part two of  
13 the discretionary function test is met and Defendant's hazardous tree  
14 inspection, mitigation, and warning decisions are shielded from  
15 liability.

### 16 III. Conclusion

17 Accordingly, **IT IS HEREBY ORDERED:** Defendant's Motion for Summary  
18 Judgment (**Ct. Rec. 18**) is **GRANTED**.

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- (1) enter this Order;
- (2) provide copies to counsel;
- (3) enter judgment for Defendant;
- (4) strike all hearing and trial dates;
- (5) close the file.

S/ Edward F. Shea  


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EDWARD F. SHEA  
United States District Judge